

02-8286 BANKS v. COCKRELL

Ruling Below: CA 5, unpublished decision dated August 20, 2002.

QUESTIONS PRESENTED

In this Texas capital case, the Fifth Circuit (in an unpublished order) overturned the district court's issuance of *habeas corpus* relief as to Petitioner Delma Banks's sentence. Banks contends that the Court of Appeals reached this result only by misapplying and misinterpreting well-established precedents of this Court regarding, *inter alia*, prosecutorial suppression of material evidence favorable to a defendant, prosecutorial misuse of peremptory challenges to exclude African Americans from Banks' petit jury, and trial counsel's ineffective assistance of counsel. Specifically, Banks seeks review by this Court of the following questions:

1. Did the Fifth Circuit commit legal error in rejecting Banks' *Brady* claim - that the prosecution suppressed material witness impeachment evidence that prejudiced him in the penalty phase of his trial - on the grounds that:

(a) the evidence supporting the claim was procedurally defaulted, notwithstanding the fact that, like in *Strickler v. Greene*, 527 U.S. 263 (1999), there was no reasonable basis for concluding that counsel for Banks could have discovered the suppressed evidence prior to or during the trial or state post-conviction proceedings; and

(b) the suppressed evidence was immaterial to Banks' death sentence, where the panel neglected to consider that the trial prosecutors viewed the evidence to be of "utmost importance" to showing a capital sentence was appropriate?

2. Did the Fifth Circuit act contrary to *Strickland v. Washington*, 466 U.S. 668 (1984) and *Williams v. Taylor*, 529 U.S. 362 (2000), where it weighed each item of mitigating evidence separately and concluded that no single category would have brought a different result at sentencing without weighing the impact of the evidence collectively?

3. Did the Fifth Circuit act contrary to *Harris v. Nelson*, 394 U.S. 286 (1969) and *Withrow v. Williams*, 507 U.S. 680 (1993) in holding that Fed. R. Civ. P. 15(b) does not apply to habeas proceedings because "evidentiary hearings" in those proceedings are not similar to civil "trials"?

~~4. Did the Fifth Circuit err in refusing to consider Banks' jury discrimination claim - virtually identical to one this Court is considering in *Miller-El v. Cockrell* (No.01-7662) - based upon its conclusions that:~~

~~(a) the state courts' rejection of that claim rested upon an adequate and independent state ground; and that~~

~~(b) there was inadequate prejudice to Mr. Banks's interests to excuse his counsel's failing to present, at trial, direct and statistical evidence of the prosecution's consistent policy of using peremptory challenges to keep African Americans off felony juries?~~

CERT. GRANTED: 4/21/03

Limited to questions 1, 2, and 3 presented by the petition.